ATLANTIC SCOPE (M) SDN. BHD.

v.

THE DIRECTOR GENERAL OF CUSTOMS AND EXCISE MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[ORIGINATING SUMMONS NO. R2-24-10-94]
5 OCTOBER 1994

CUSTOMS AND EXCISE: Importation of prohibited goods without a license - Goods seized by Customs but returned to plaintiff upon payment of cash security pursuant to s. 115(1)(b) of the Customs Act - Forfeiture of security - Defendant compounding offence but decided to forfeit security - Whether forfeiture lawful - Whether defendant had power to forfeit security - Whether power to forfeit lies only with the Court - Customs Act 1967 ss. 114(1), 115(1)(b), 131, 135(1)(a).

In June 1993 the plaintiff imported 1840 cartons of cigarettes (the goods) from Singapore without a license and by that had contravened s. 135(1)(a) of the Customs Act 1967. The goods were later seized by the Customs pending investigation under s. 114(1) of the Act. On 2 September 1993, the defendant informed the plaintiff that they had decided to return the goods on condition that the plaintiff pay RM1,158,224.80 as security and re-export the goods. The plaintiff complied and subsequently paid the security and re-exported the goods to Japan. On 19 January 1994 the defendant notified the plaintiff that it had committed an offence under s. 135(1)(a) of the Act, and while offering to compound the offence for RM 5000, told the plaintiff that the security deposit had to be forfeited.

The plaintiff, having already complied with the defendant's condition for the release of the goods, refused to pay the compound fee and applied for a declaration that the security deposit herein is not forfeitable, as well as for the return of the same. Before the Court the issue that arose was whether, bearing in mind the fact that the goods had already been exported, and the provisions of ss. 127(1A) and 131 of the Act, the defendant had the right to forfeit the said security deposit.

Held:

[1] In the present case, by virtue of s. 131(3) of the Customs Act 1967 only the goods are forfeitable but not the security deposited. Section 127(1A) however empowers the Court to order forfeiture of the amount secured under s. 115(1)(b) if it is proved that an offence has been committed. Thus only a Court can consider forfeiture of the security deposited following the successful proof of the commission of an offence against the Act or any regulation made thereunder. Such power to forfeit does not lie with the defendant.

[2] If the defendant had wanted to forfeit the security deposited, they should have charged the plaintiff in Court and upon proof that an offence had been committed against the Act, urge the Court to order forfeiture. This was not done and the defendant instead elected to have the offence compounded. In the circumstance, the security deposited must be returned to the plaintiff, less the sum of RM 5000 compound fee which the plaintiff is now prepared to pay.

[Application allowed].

Legislation referred to:
Customs Act 1967, ss. 114(1), 115(1)(b), 127(1A), 128(4), 131(1), (3), 135(1)(a)
Free Zones Act 1990, ss. 4, 5(2)

For the plaintiff - Harpal Singh Grewal; M/s. A.J. Ariffin, Choo & Harpal
For the defendant - Hazman Ahmad, Federal Counsel

JUDGMENT

Siti Norma bte Yaakob J:
The plaintiff in these proceedings is involved in the business of import and export. In June 1993, the plaintiff imported 1,840 cartons of cigarettes from Singapore and the goods were kept in a godown in the Free Trade Zone in Port Klang, pending their onward transmission to their final destination.

On 20 August 1993, the defendant issued a notice seizing and detaining the goods pending investigations under s. 114(1) of the Customs Act 1967 (the Act). Cigarettes are prohibited goods and a licence is required for their importation. It is not disputed that the plaintiff did not obtain such a licence at the time of their importation.

On 2 September 1993, the defendant acting under s. 115(1)(b) of the Act, informed the plaintiff that they had decided to exercise their discretion by returning the goods to the plaintiff on condition that the plaintiff pay the open market value of the goods, the customs duty payable and the tax payable amounting to RM1,158,224.80 as security and that the goods must be re-exported. The plaintiff was also informed that if it fails to take back the goods, the defendant would sell such goods in the open market and the proceeds will be kept by the defendant pending the outcome of any prosecution or claim. The plaintiff was given 7 days within which to respond to the defendant's letter.

On 24 September 1993, the plaintiff deposited the security with the defendant and following the release of the goods, the plaintiff re-exported the goods to Japan on 28 September 1993.

On 19 January 1994, the defendant informed the plaintiff that it had committed an offence under s. 135(1)(a) of the Act for importing prohibited goods and for this offence, the defendant were prepared to compound the offence with a compound fee of RM5,000. The plaintiff was also informed that if it was prepared to pay the compound fee within 14 days, it will not be prosecuted. However, the seized goods would be forfeited but as they had already been re-exported, this would mean that the security deposited by the plaintiff would be forfeited.

The plaintiff refused to pay the compound fee as it maintains that it had not committed any offence and since it had already complied with the defendant's conditions regarding the release of the goods, the security deposit is not forfeitable and in these proceedings, the plaintiff seeks a declaration to that effect as well as the return of the deposit and other consequential reliefs.

The first issue taken is whether the Free Zones Act 1990 or the Act apply to the facts of this case. The plaintiff contends that the 1990 Act applies, as the goods were stored in the free trade zone area. This does not necessarily mean that the defendant were acting under ss. 4 and 5(2) of the 1990 Act when they issued the notice dated 20 August 1993, seizing and detaining the goods. The notice itself does not specify under which Act the defendant were acting, but bearing in mind the subject matter of the dispute and that the notice originated from the defendant, they must be acting under s. 114 of the Act,

which empowers the defendant to seize goods which is the subject matter of an offence pending investigations into the offence. If there had been any doubt as to the powers of the defendant, that doubt had been cleared when they issued their second notice dated 2 September 1993, where they specifically stated that they were acting under s. 115(1)(b) of the Act when they decided to release the goods subject to the conditions that a security be furnished and the goods be re-exported.

Perhaps the only substantial issue raised in these proceedings is whether the defendant have the right to forfeit the security deposited as they had threatened to do in their letter dated 19 January 1994, particularly when the goods have already been re-exported.

The plaintiff has admitted that it imported the goods, a prohibited item without a licence, an offence punishable under s. 135(1)(a) of the Act. Section 131(1) of the Act empowers the defendant to compound such an offence and that power was exercised by the defendant when they indicated they were prepared to accept RM5,000 compound fee from the plaintiff. Under subsection (3) of the same section, on payment of such a sum, the goods seized shall be released and no further action shall be taken against the plaintiff or property, unless the property consists of goods the import of which is prohibited in which case such goods shall be forfeited. Provided that where the prohibition is conditional upon a licence being issued in respect of the import of such goods, the defendant can release such goods if a licence is subsequently issued.

In this instance, the plaintiff refused to pay the compound fee and it was only before me that it decided to do so. There is no evidence that a licence had been subsequently issued. Under s. 131(3), only the goods are forfeitable but not the security deposited. This brings me to the purpose why the security was asked for in the first place. Under s. 115(1)(b) of the Act, it would appear that the security, which represents the open market value of the goods, the customs duty payable and any tax payable, is to cover the situation where the Court makes an order for forfeiture of such amount under s. 127(1A) or s. 128(4) of the Act.

Section 128(4) is not applicable to the facts of this case. Section 127(1A) empowers the Court before whom a prosecution has been held, to order forfeiture of the amount secured under s. 115(1)(b) if it is proved that an offence has been committed. Thus only a Court can consider forfeiture of the security deposited following the successful proof of the commission of an offence against the Act or any regulation made thereunder, though not necessarily the conviction of the offender. Such power to forfeit does not lie with the defendant. If the defendant wanted to forfeit the security deposited, they should have charged the plaintiff in Court and upon proof that an offence had been committed against the Act, urge the Court to order forfeiture. This was not done but, instead, the defendant elected to have the offence compounded and since they have no power to forfeit the security deposited, I allowed the plaintiff's application to the extent that the security deposited be returned to the plaintiff within one month, less the sum of RM5,000 compound fee which the plaintiff was prepared to pay, and that the defendant also pay the costs of these proceedings to the plaintiff.